No. 83-1566

In the Supreme Court of the United States

October Term, 1983

DARNELL HUNTER,
Petitioner,

vs.

REARDON SMITH LINES, LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, as the appellate court stated, the Defendant shipowner was entitled to have the jury instructed as to the stevedore's primary responsibility for the longshoremen's safety during loading operations, just as it was entitled to have the jury instructed that it had no general duty to discover unknown dangers.

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Respondent, REARDON SMITH LINES, LTD., replies to the Petition for Writ of Certiorari filed by the Petitioner and respectfully requests the Petition be denied as no reason for granting the writ has been presented.

OPINION BELOW

In this personal injury suit brought by a longshoreman against the shipowner, the jury was properly instructed that the shipowner had no general duty to discover unknown dangers. However, the jury was not instructed with regard to known dangers and the proper allocation of responsibility. On the facts in this case, that omission constituted reversible error, as found by the appellate court. Petitioner's request for rehearing on the point was denied by the appellate court.

JURISDICTION

The jurisdictional requirements are adequately set forth in the petition.

STATEMENT OF THE CASE

The facts of the case are presented fairly in the opinion of the Eleventh Circuit Court of Appeals. Respondent takes exception to the facts as augmented in Petitioner's brief. Where additional evidence must be cited, reference will be made to the Record on Appeal.[1]

While petitioner states the evidence was uncontradicted on certain points the record shows otherwise.

Petitioner argues that it is uncontradicted that the ship's crane was defective from the beginning of the stevedore's operations while the more substantial evidence is that the crane had been operating properly for at least two days prior to the accident, that there were no repairs to the crane following the accident and that the crane continued to function properly following the accident for the remainder of that day and the two following days. (Baker deposition at 20-29, Hurst deposition at 16, 17, Tr. 268, 303, 305, 317, 326).

Similarly, petitioner contends that the evidence is uncontradicted that the shipowner failed to properly repair the ship's crane some time prior to the accident but

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1. "Tr" refers to the consecutively-paginated seven volumes of trial testimony and argument which are designated volumes 5-11 of the Record (R) on Appeal. Three depositions were read at trial but not transcribed. The depositions are contained in the Record and will be designated by the name of the individual deposed—for example, "Baker deposition at ....."

"Br" refers to Petitioner's brief.

again the substantial evidence is to the contrary. (Hurst deposition at 16, 17, Baker deposition at 26, 28, 29, Tr. 303, 317, 326). The uncontradicted evidence is that there were no repairs to the ship's crane at the time of the accident, that the same crane was used continuously for the remainder of the day following the accident without repair and that it was used the two following days to work cargo without repair. (Baker deposition at 20-29).

The stevedore reported no down time on the crane following the accident as would have been the case if cargo operations were suspended for repairs to the crane. (Tr. 268, 305).

Petitioner's argument is largely based on the premise that the evidence was uncontradicted that the shipowner failed to provide a safe place to work at the outset. The substantial evidence is simply contrary to petitioner's assertions.

The alleged failure of the shipowner to provide a safe place to work at the outset exists only in petitioner's argument.

Petitioner's second point, the assertion that the ship had actual knowledge of a defect in the winch immediately prior to the accident is similarly misplaced.

Again petitioner argues that the evidence is uncontradicted that the shipowner had knowledge of a defect in the winch immediately prior to the accident. Again, the substantial evidence is to the contrary. (Tr. 303, 317, 326, Baker deposition at 26, 28, 29).

Petitioner's third and final point is that the evidence was uncontradicted that Reardon attempted unsuccessfully to repair the crane when it malfunctioned.

Like the other two points, this is simply not the case. The substantial evidence again is to the contrary. (Tr. 303, 317, 326, Baker deposition at 28, 29, Hurst deposition at 16, 17).

Petitioner fails to note that he was employed by an independent stevedore, Tampa Stevedoring Company, not not by the shipowner. Petitioner does note that the ship's third officer was on deck, but fails to note that Petitioner agreed at the trial level to delete any reference to Respondent's having undertaken, by contract or course of dealing, any duty of supervision. (A12, n.13). No duty of this nature was shown by the evidence. Petitioner states that there was evidence the crane was not functioning properly but fails to state that direct evidence was presented that the crane *was* functioning properly after the repairs. The appellate court's opinion recognized the evidence from the ship's captain, the chief officer, and several longshoremen including the crane operator and the safety man, that either the crane was operating properly or that they could not recall any problems. (A8, n.10). Thus, Petitioner's assertion that the direct evidence showed the crane was not operating properly presents a biased view of the facts as direct evidence showed the crane was operating perfectly normally.

THE DECISION BELOW

As the appellate court stated, the facts in *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156 (1981), were similar to the facts in this case. (A6). In *Scindia* the court required the exercise of ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able,

by the exercise of reasonable care, to carry out its cargo operations with reasonable safety to persons and property. The ship must also warn the stevedore of any hazard not known to the stevedore and not obvious to or anticipated by him if reasonably competent in the performance of his work. 451 U.S. at 166-67. The trial court instructed the jury in this regard and in accord with *Scindia's* directives on unknown dangers. (A9).

However, the trial court's instructions gave no guidance to the jury with regard to a problem known to both the shipowner and the stevedore. (A9). In addition, the trial court instructed the jury that for Plaintiff to prevail, Plaintiff had to prove by a preponderance of the evidence that the Defendant was negligent. The context of the instruction implied that this negligence would have been a failure to supervise the cargo operation. (A9, Tr. 482-83). Instruction in this regard failed to comply with the law stated by the Supreme Court in *Scindia*. The jury should have been made aware of the duties and responsibilities of each entity. (A9).

Petitioner inaccurately characterized the appellate court as holding that uncontradicted evidence showed a failure to provide a safe place to work and showed that the shipowner was in fact supervising and had failed to repair a defect. (Br. at 5, 11, 13). Such uncontradicted evidence does not exist and for the trial court to have assumed it existed would have invaded the province of the jury. Petitioner's position fails to recognize that the *Scindia* decision placed primary responsibility for the unloading operation on the stevedore and would deny that the jury had a right to know of this decision.

ARGUMENT

Introduction

The Court's instruction must not invade the province of the jury by determining questions of fact. However, the instructions must provide jury members with those principles of law which they are duty bound to apply to the facts in the case in order to render a verdict. The instructions given at the trial level dealt only with the shipowner's duty with respect to unknown dangers. These instructions did not give the jury any guidance about the scope of the shipowner's duty regarding known problems. The shipowner was legitimately concerned at the trial level that the jury be given guidance on all applicable elements of law. The appellate court's decision will now require an instruction in the essential elements of law as set forth in *Scindia*.

Scindia held that the shipowner has the right to rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards, as a general matter. The stevedore, not the shipowner, is required by statute to provide a "reasonably safe" place to work and to take such safeguards with respect to equipment as may be determined necessary. *Id.* at 170. On the facts in *Scindia*, it was apparent to those working with the ship's winch that it had been malfunctioning for two days prior to the accident. As the court noted, "even so, whether it could be safely used or whether it posed an unreasonable risk of harm to Santos or other longshoremen was a matter of judgment committed to the stevedore in the first instance." *Id.* at 175. The court made clear that the "legal duties placed on this stevedore and the vessel's justifiable expectations that those duties will be performed are relevant

in determining whether the shipowner has breached its duty." *Id.* at 176, and where appropriate, the jury should thus be made aware of the scope of the stevedore's duty and of the positive law. *Id.*

The *Scindia* court further stated that disputed material facts should not be resolved by the district court alone. *Id.* at 178. That determination is equally applicable in the instant case.

As the Fifth Circuit found in *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983), the most basic principle emerging from *Scindia* is that the primary responsibility for the safety of the longshoremen rests upon the stevedore. *Id.* at 1036. It is up to the jury to then resolve disputed evidence under the proper instructions. *Id.* at 1040.

An erroneous or incomplete statement to the jury on the duties of all involved would affect a vital issue. (A13, n.15). Such incomplete statements could well affect a jury finding. *Evans v. Transportacion Maritime Mexicana*, 639 F.2d 848, 860 (2d Cir. 1981). In *Evans*, the court found it totally "unrealistic" to assume that a jury could meaningfully assess shipowner participation without being informed of the primary responsibility of the stevedore.

The Decision Below Is Correct

Reardon admittedly knew the crane was down from shortly after 0800 to 0955, but the ship's log shows a dispute as to whether it was the ship's fault or the stevedore's fault. (Baker deposition at 21). The fact that the shipowner knew of the malfunction would not in and of itself make the shipowner negligent; it might be reasonable for the shipowner to rely on the stevedore's judgment that the equipment, though defective, was safe enough. *United*

States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba, 683 F.2d 1022 (7th Cir. 1982). A similar finding was made in *Bonds v. Mortensen & Lange*, 717 F.2d 123 (4th Cir. 1983). In *Bonds*, the bell on the operator's cab was found to have been malfunctioning from the commencement of the stevedoring operation three days prior to the incident. This malfunction was known to all and the shipowner was held to be entitled to rely on the stevedore's judgment as to whether discharge operations could be safely undertaken. The stevedore had obviously concluded that the conditions did not pose an unreasonable risk of harm, for the longshoremen proceeded to unload the ship's cargo without complaint or incident until the time of the incident.

In the instant case, whether there even was a malfunction at the time of the incident is debatable. No complaints were received by the shipowner after the crane was returned to service. No stoppage of work occurred because of the incident. (Tr. 90, 268). The crane worked two full days before this incident and two full days after this incident. Plaintiff's fellow longshoreman actually working the crane stated that it was "operating fine." He continued to use it after the incident. (Tr. 303). The hatch tender, also a fellow employee of petitioner, stated that the crane was "running normally. It was okay." (Tr. 326). These witnesses were plaintiff's co-workers. They owed nothing whatsoever to the ship. They had reason to know. Those testifying to a malfunction were all in the hold, same distance from the operation. In any case, the jury should have been properly instructed, as the appellate court required.

As noted, the statutory duty for providing a safe place to work rests on the stevedore. The shipowner owed no duty to supervise or inspect. The presence of an of-

ficer has not been taken to mean that the shipowner undertook any duty beyond those required in *Scindia*. In particular, the presence of an officer of the ship's crew does not constitute "active involvement." *Bonds v. Mortensen & Lange*, 717 F.2d 123 (4th Cir. 1983). As the shipowner in *Albergo v. Hellenic Lines, Inc.*, 658 F.2d 66 (2d Cir. 1981), argued and the court approved, the vessel owner is entitled to anticipate that the stevedore and his longshoremen will abide by regulations. *Id.* at 69. Otherwise, longshoremen will know they can ignore statutes, receive compensation and then try for even more money by suing the vessel. *Id.*

No continuing duty of supervision is or should be imposed simply because a repair was needed at some point in time. To impose such a requirement would place the primary duty of supervision back on the shipowner immediately after the vessel's first repair. No repair would ever be complete.

Plaintiff's reference to *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), and *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 657 F.2d 25 (3rd Cir. 1981), *cert. denied*, 456 U.S. 914 (1982), as support for such a continuing responsibility is inapposite. In both, the danger in the cargo itself was not in controversy. In this case, if any problem existed, that problem had been repaired. The Chief Officer testified that after the repairs were complete, the operation was "perfectly normal." (Baker deposition at 28). Despite implications or suggestions otherwise, no authority cited supports plaintiff's proposition that the shipowner has the duty constantly to monitor the stevedore's work after the completion of a repair.

As the appellate court stated (A9, 11), the jury should be instructed that the stevedore retains primary responsi-

bility for known dangers. In addition, *Scindia* held that even when a shipowner had actual knowledge of a dangerous condition, the judgment as to whether the risk involved is unreasonable is initially the stevedore's. *Id.* at 175. Only if such a risk is "obviously improvident" does the shipowner have any duty to intervene. Whether any danger existed was certainly debated in the instant case. No evidence at all was cited as to "obvious improvidence." The duty suggested by plaintiff ignores *Scindia* and would in fact reverse *Scindia's* holding.

Additionally, the evidence in this case does not support such a duty. Plaintiff contends that the shipowner affirmatively joined in the decision to keep working and that the longshoremen had no choice but to face the alleged danger. (Br. at 11). Petitioner cites *Lieggi v. Maritime Co. of the Philippines*, 667 F.2d 324 (2d Cir. 1981), where the shipowner was actually involved and issued specific directives. However, in the case at bar, no evidence showed that the shipowner affirmatively joined any decision made by the stevedore to continue working. The party having the primary responsibility for that decision was the stevedore, *Scindia* at 175, 180, and the jury should have been informed as to these duties.

Had the stevedore determined that the working conditions were unsafe (and there is no evidence that such a decision was ever made), several options were available. Plaintiff's assertion that no option existed is unfounded and unsupported by the record. The stevedore could have halted work until satisfied with the conditions. Or, the stevedore could have brought in a shoreside crane.

No Questions of Importance Are Involved

As the *Scindia* court noted, certiorari may be granted when the courts of appeal are in conflict or "considerable disagreement". *Scindia* at 169. Such conflict is not in evidence here. Neither is any question of extreme public importance. The case is important to the parties because a sum of money is involved. In addition, having one's "day in court" is a cornerstone of our system. The decision of the appellate court provides for those considerations, in part by mandating a clear and appropriate instruction to the jury under the facts of the case. Further review is not warranted.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed this 30th day of April, 1984 to: Joel S. Perwin, Esq., of PODHURST, ORSECK, PARKS, JOSEFSBURG, EATON, MEADOW & OLIN, P.A., 25 West Flagler Street, Miami, Florida 33130 and to Roger Vaughan, Esq. of WAGNER, CUNNINGHAM, VAUGHAN AND McLAUGHLIN, P.A., 708 Jackson Street, Tampa, Florida 33602.

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APPENDIX

Darnell HUNTER, Plaintiff-Appellee,
Cross-Appellant,

v.

REARDON SMITH LINES, LTD., a foreign
corporation, Defendant-Appellant,
Cross-Appellee.

No. 81-6143.

United States Court of Appeals,
Eleventh Circuit.

Nov. 14, 1983.

Longshoreman brought action against shipowner seeking damages for injuries sustained while working on the vessel. The United States District Court for the Middle District of Florida, George C. Carr, J., entered judgment on a jury verdict in favor of longshoreman, and cross appeals were taken. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) trial court, which properly charged jury that shipowner had no general duty to discover unknown dangers, committed reversible error in failing to instruct jury that stevedore retained primarily responsibility even with respect to dangers which are known to the shipper, and (2) effect of future inflation is properly considered in calculating any award of future damages which longshoreman received for injuries sustained while working aboard vessel.

Reversed and remanded.

1. Federal Courts (Key) 911
Shipping (Key) 86(3)

In suit brought by longshoreman against shipowner to recover damages for injury sustained when he was struck

by a bag of phosphate which had fallen from a pallet which was being carried by a crane, trial court, which properly charged jury that shipowner had no general duty to discover unknown dangers, committed reversible error in failing to instruct jury that stevedore retained primary responsibility even with respect to dangers which are known to the shipper.

2. Damages (Key) 226

Effect of future inflation is properly considered in calculating any award of future damages which longshoreman received for injuries sustained while working aboard vessel.

Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

Darnell Hunter, a longshoreman, was injured while working aboard the motor vessel FRESNO CITY in Tampa, Florida. Hunter brought this action for negligence against the shipowner, Reardon Smith Lines. The District Court for the Middle District of Florida entered judgment on a jury verdict for $157,800 in Hunter's favor. Reardon Smith appeals, contending *inter alia* that the district court's instructions to the jury did not adequately set out the governing law as interpreted by the United States Supreme Court in *Scindia Steam Navigation Co. v. Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). We agree, and thus we reverse and remand for a new trial. In addition, we grant Hunter's cross-appeal and order that the effect of future inflation should be considered in calculating any award for future damages Hunter receives on remand.

I. FACTUAL SUMMARY

On July 26, 1978, Hunter was employed as a longshoreman by the Tampa Stevedoring Co. ("the stevedore") and was assigned to a gang of approximately 14 men who were loading bags of phosphate into hold number three on the FRESNO CITY. The bags of phosphate weighed approximately 110 pounds each and previously had been loaded on pallets by the stevedore. Several members of Hunter's gang were on the dock attaching spreader bars to the pallets. One gang member was operating the ship's number three crane and another member of the gang was on the deck giving signals to the crane operator. The remainder of the gang members, including Hunter, were in hold number three, unloading bags off the pallets and stowing them in the hold.

Longshoremen were working in all five of the FRESNO CITY's holds on July 26, and work began at approximately 8:00 a.m. Within a few minutes, however, the crane which was carrying pallets to the number three hold was taken out of service, apparently because it was leaking oil or hydraulic fluid.[1] The ship's engineers worked on the crane for almost two hours, and the crane was put back into operation sometime between 10:00 and 10:30 a.m. There was conflicting testimony regarding whether the crane was functioning properly after it began operating again.[2]

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1. One witness testified that the crane was "pouring oil," Record on Appeal ("ROA"), vol. 6, at 68. The ship's chief officer testified that the crane lost 20 gallons of hydraulic fluid in 10 minutes. Deposition of Chief Officer Robert E. Baker at 60.

2. Hunter's witnesses, all longshoremen who were down in the hold, testified that during this time the crane was "dragging," "smoking bad," leaking oil," and making a "whining noise," and that the crane was just "barely coming over to the top, and then a lot of time it would stop in the middle of the air and

(Continued on following page)

Hunter's accident occurred less than an hour after the crane was put back into operation. Hunter and three other longshoremen were building a runway in the hatch area when two bags fell off off a pallet above them. One of the bags landed on the deck, but the other bag fell into the hold and hit Hunter on the back.[3] One of the men working with Hunter testified that the bags fell because the crane stopped suddenly and jarred the bags off the pallet. Another man working in the hold testified that the crane "cut off" and dropped the pallet slightly, causing the pallet to hit the edge of the hatch opening and thus knocking the bags loose. Other witnesses testified that the crane did not stop suddenly and that the pallet did not hit anything, and some of the witnesses contended that the bags of phosphate simply were slippery and often fell off without explanation.

Although Hunter was knocked down and momentarily stunned by the blow from the bag, in a few minutes he was able to slowly climb a ladder out of the hold[4] and was taken to a hospital. The rest of the longshoremen in hold number three continued the loading operation, using the same crane which allegedly had caused Hunter's injury.

Footnote continued—

swing." ROA, vol. 6, at 29, 30, 48, 70. In contrast, Reardon Smith's witnesses, the ship's captain, the chief officer and several longshoremen, including the crane operator and the safety man, testified either that the crane was operating properly or simply that they could not remember any problems with the crane after it was put back into operation.

3. Some witnesses testified that Hunter was in the hatch opening, and Reardon Smith contended that this constituted contributory negligence. Other witnesses indicated that Hunter was in the wings rather than in the hatch opening and that the bag hit the corner of the hatch and richocheted into the wings. The jury found that Hunter was not contributorily negligent.

4. The longshoremen on the deck had lowered a stretcher for him, but Hunter decided to climb a ladder to get out of the hold.

The ship's engineers did shut down the crane at 11:50 a.m., apparently to make some repairs or to perform some maintenance,[5] but the crane was back in operation at 1:00 p.m. when the longshoremen returned from lunch and was used without incident for the rest of that day[6] and the two days which followed.

Hunter spent two days in the hospital in traction. Subsequently, he was treated by several physicians for a variety of problems which he attributed to his injury. The jury awarded Hunter $7,800 for "past damages" (lost wages, medical bills, pain and suffering), $50,000 for future pain and suffering, and $100,000 for loss of future wages.

II. THE JURY INSTRUCTIONS

[1] Reardon Smith's primary contention[7] on appeal is that the district court did not adequately instruct the jury on the law which governs a shipowner's duty to longshoremen working on board a vessel. Both parties agree that the jury should have been instructed in accord with the rules established by the Supreme Court in *Scindia Steam Navigation Co. v. Santos, supra,* and we begin our analysis of this issue with a brief review of the *Scindia* decision.

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5. The ship's engineers did not testify at trial. Thus, it is not entirely clear why the crane was shut down just 10 minutes before the lunch break, nor is it clear what repairs, if any, were undertaken at this time.

6. Hunter points out that the crane was shut down at 3:30 p.m. on the day of the accident and argues that the early shutdown suggests that the crane was malfunctioning. The record indicates, however, that all of the ship's loading operations stopped at that time due to rain. Thus, the fact that the crane was shut down at 3:30 p.m. does not suggest that anything was wrong with the crane.

7. Reardon Smith raised a number of other contentions on appeal. The other major contention, that the jury's verdict was against the manifest weight of the evidence and excessive as a matter of law, is without merit. The remaining contentions relate to issues which may not arise again on remand; thus, we need not consider them.

The facts in *Scindia* were similar to the facts in this case. A longshoreman was injured when he was struck by a sack of wheat that had fallen from a pallet being held in suspension by one of the ship's winches, which was being operated by another longshoreman. The evidence established that the braking mechanism which slowed the winch's descent had been malfunctioning for several days, but it was not clear whether the sacks which hit the longshoreman had fallen because the braking mechanism slipped or because the suspended pallet was swinging back and forth.

The district court had granted summary judgment for the shipowner, reasoning that the shipowner was not liable for dangerous conditions created by the stevedore, the longshoreman's employer, while the stevedore was in exclusive control of the loading operation. The Court of Appeals for the Ninth Circuit had reversed, ruling that a shipowner had to exercise "reasonable care under the circumstances" and that there were factual questions about the shipowner's conduct which had to be resolved by a jury. The Supreme Court affirmed the Ninth Circuit's judgment, but set forth a somewhat different standard regarding the duty the shipowner has to longshoremen working on board a vessel.

The Supreme Court ruled that at the outset of cargo operations the shipowner's duty

> extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should

> be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

451 U.S. at 166-67, 101 S.Ct. at 1622. Once cargo operations have begun, however, the scope of the shipowner's duty usually is somewhat limited.[8] According to the Supreme Court:

> [A]bsent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself.

Id. at 172, 101 S.Ct. at 1624. Nevertheless, addressing the situation where a shipowner learns that an apparently dangerous condition has developed during the cargo operations, the Supreme Court held that "there are circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations." *Id.* at 175, 101 S.Ct. at 1626. Thus, although

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8. Even though cargo operations have begun, the shipowner may be liable for injuries to longshoremen if the shipowner is "actively involve[d]" in the cargo operations or "fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation." 451 U.S. at 167, 101 S.Ct. at 1622.

the court noted that the determination of whether problems with the ship's gear pose an unreasonable risk of harm to the longshoremen is "a matter of judgment committed to the stevedore in the first instance," *id.*, the court held that if the shipowner is aware that the ship's gear is malfunctioning, that the stevedore is nonetheless continuing to use it, and that the stevedore's continued use of the gear is "obviously improvident," then the shipowner has a duty to intervene and repair the ship's gear. *Id.* at 175-76, 101 S.Ct. at 1626-27.

In this case, Hunter argued at least two theories of liability to the jury.[9] First, Hunter argued that Reardon Smith's employees negligently turned over a malfunctioning crane to the stevedore, thus breaching the duty to have the ship and its equipment in proper condition so that the stevedore could carry on cargo operations with reasonable safety. Second, Hunter argued in the alternative that a dangerous condition arose during the course of the cargo operations, that Reardon Smith's employees were aware of the dangerous condition,[10] and that Reardon Smith's employees failed to intervene even though they knew or should have known that the stevedore's continued use of the crane to load bags of phosphate created an unreasonable risk of harm to the longshoremen, thus breaching the shipowner's duty to act when the stevedore's actions are obviously improvident.

Although the district court properly instructed the jury regarding the shipowner's duty to have the ship and

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9. Hunter suggests a third theory on appeal—that Reardon Smith is liable because its employees negligently failed to repair the crane after voluntarily undertaking a duty to make repairs. We need not consider this theory or decide whether it was adequately submitted to the jury. *See* note 15 *infra*.

10. Hunter made a strong effort during the trial to convince the jury that the FRESNO CITY's officers were aware that the crane was malfunctioning after it was put back into operation.

its gear in proper condition for the stevedore,[11] we conclude that the court did not adequately inform the jury about the limited nature of the shipowner's duty once the stevedore has commenced, and assumed primary responsibility for, the cargo operations. The only instructions the district court gave regarding the shipowner's duty after cargo operations have begun were as follows:

> [O]nce the stevedore's cargo operations have begun, absent positive law or custom to the contrary, the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to *discover* dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. Thus, the shipowner is not liable to the longshoremen for injuries caused by dangers *unknown* to the shipowner and about which he had no duty to inform himself.

Record on Appeal, vol. 11, at 484 (emphasis added). These instructions were in accord with *Scindia*, but they dealt only with Reardon Smith's duty, and the limits thereon, with respect to *unknown* dangers. The instructions did not give the jury any guidance about the scope of the shipowner's duty when there is a problem with the ship's gear that is *known* to both the shipowner and the stevedore. Such guidance was necessary for the jury to properly consider Hunter's second theory of liability. In other words, there are two potential duties on the part of the shipowner once cargo operations have begun: the potential duty to *discover unknown* dangers, and the potential duty with respect to dangers which are *known* to the shipowner. The trial court here, in the instruction

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11. The court's instructions on Hunter's first theory of liability were taken almost verbatim from the Supreme Court's *Scindia* decision.

quoted above, properly charged the jury that the shipowner has no general duty to *discover unknown* dangers. However, the quoted instruction does not address the shipowner's second potential duty, *i.e.*, with respect to dangers which are *known* to the shipowner. With respect to this potential duty the Supreme Court in *Scindia* precisely defined the *very limited* duty of the shipowner:

> Yet it is quite possible, it seems to us, that . . . [the stevedore's] judgment in this respect was so obviously improvident that . . . [the shipowner], if it *knew* of the defect and that . . . [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch.

451 U.S. at 175-76, 101 S.Ct. at 1626 (footnote omitted) (emphasis added). The Court also defined the primary responsibility of the stevedore:

> [W]hether it could be safely used or whether it posed an unreasonable risk of harm to . . . [the longshoremen] was a matter of judgment committed to the stevedore in the first instance.

Id. at 175, 101 S.Ct. at 1626. The Supreme Court went on to rule:

> [T]he legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty. The trial court and where appropriate, the jury, should thus be made aware of the scope of the stevedore's duty under the positive law.

Id. at 176, 101 S.Ct. at 1626.

Although the trial court here may have properly charged the jury as to the primary nature of the stevedore's responsibility during cargo operations with respect to the discovery of *unknown* dangers, it failed to instruct the jury that the stevedore retains the primary responsibility even with respect to dangers which are *known* to the shipowner. Reardon Smith requested, and was entitled to, such instructions. We thus conclude that the district court erred. The error is significant because the trial focussed on Reardon Smith's duty with respect to *known* dangers. The Supreme Court in *Scindia* expressly held that the jury should be made aware of the "duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed." *Id.* at 176, 101 S.Ct. at 1626.

The error was magnified by a paragraph early in the jury charge which suggested to the jury that the shipowner had a duty to supervise the cargo operations. The district court instructed the jury:

> In this case, the plaintiff claims that the defendant was negligent and that such negligence was a legal cause of damage sustained by the plaintiff. Specifically, the plaintiff alleges that the crane on the M/V FRESNO CITY was malfunctioning before the accident and that the defendant was negligent in failing to properly maintain and repair the ship's crane at hatch number three *or to properly supervise cargo operations.* In order to prevail on this claim, the plaintiff must prove by a preponderance of the evidence, one, that the defendant was negligent, and two, that such negligence was a legal cause of damage sustained by the plaintiff.

Record on Appeal, vol. 11, at 482-83 (emphasis added). We recognize that this instruction merely told the jury that

"*the plaintiff alleges* . . . that the defendant was negligent in failing . . . to properly supervise cargo operations." *Id.* (emphasis added). However, the last sentence might have given the jury the impression that the plaintiff could prevail on his claims—including the "failure to supervise" claim—merely by proving negligence and proximate cause. Such an impression would have been reinforced by comments Hunter's counsel made during closing argument[12] which also suggested that Reardon Smith had a duty to supervise the cargo operations.[13]

We conclude, therefore, that the district court did not adequately instruct the jury on the law relevant to Hunter's second theory of liability. Further, although the court properly instructed on Hunter's first theory of liability, the jury returned only a general verdict and we are unable to determine from the record which theory the jury relied

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12. For example, in response to Reardon Smith's argument that the crane was not malfunctioning and the the bags of phosphate fell off the pallet because the bags were covered with plastic and, therefore, were very slippery. Hunter's attorney argued that the ship's crew members had a duty to stop the cargo operations if they saw the stevedore loading slippery bags without taking proper safety precautions. *See, e.g.*, ROA, vol. II, at 433 ("[T]hen if you think that they were using an unsafe method of slippery bags and no safety slings, the mate—all the mates saw that and under the law did not do anything about it."); *id.* at 473 ("The chief mate did see bags—said he thought he saw some bags slip off on the dock and he didn't do anything about it like he was supposed to do."); id. at 473-74 ("But the guy I would like to hear is . . . the third or second mate, . . . to ask them a couple of questions: If you saw these dangerous slippery bags, why didn't you do something?").

13. Hunter suggests on appeal that a charge imposing a duty to supervise cargo operations on Reardon Smith is not error in any event because Reardon Smith did, by contract or course of dealing between the parties, undertake a duty of supervision. This argument cannot sustain the verdict because at the charge conference Hunter's counsel expressly agreed to delete any reference in the jury instructions to Reardon Smith's having undertaken *by contract* any duty to supervise. Record on Appeal, vol. 10, at 367.

upon in reaching that verdict.[14] Accordingly, we reverse the judgment rendered below and remand for a new trial.[15]

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14. This case again illustrates the potential value of special verdicts. *See* Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1968); *cf. Petes v. Hayes*, 664 F.2d 523 (5th Cir.1981).

15. Hunter argues that this court has discretion to affirm the jury's verdict because any error in the instructions on the second theory was harmless in view of the sufficiency of the evidence on the first theory of liability. We recognize that some courts have affirmed jury verdicts under similar circumstances. *See, e.g., Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir.1980) ("Where more than one theory of recovery has been submitted to the jury in a civil case, and where on appeal it is claimed that as to one of the theories there was a lack of evidential support or an error of law in submitting the theory to the jury, the reviewing court has discretion to construe a general verdict so attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error."); *cf. American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir.1969) (where trial court instructed jury that it could find for plaintiff if it found defendant negligent on any of 31 particulars, the fact that one particular was not supported by the record did not require reversal because it was "inconceivable that in the mass of testimony so clearly establishing negligence in thirty other particulars this issue could have influenced the verdict . . . ."). *But see, e.g., Mixon v. Atlantic Coast Line R.R.*, 370 F.2d 852, 860 (5th Cir.1966) (Brown, J., specially concurring) ("Under the enigma wrapped in a mystery of the general charge and general verdict, we are required to assume that the jury followed only the erroneous instruction . . . ."). *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 742 (5th Cir.1980) (Anderson, J.) (quoting Judge Brown's opinion in *Mixon;* however, the question whether an appellate court has discretion to affirm under such circumstances was not considered by the court). We acknowledge the force of Hunter's argument that an appellate court should have some discretion to treat as harmless or nonreversible an error in the instructions pertaining to one theory when there are accurate instructions with respect to other theories, but we need not address the argument or determine the scope of such discretion. Assuming *arguendo* we possess such discretion, we would not exercise it in this case. On the facts of this case, we conclude that there was a significant risk that the jury relied upon an erroneous assumption that Reardon Smith owed a duty to supervise cargo operations beyond the limited duty imposed by law. *Cf. Traver v. Meshriy*, 627 F.2d at 938-39 (outlining the factors which a court should consider in deciding whether to exercise its discretion to affirm despite an error with respect to one theory of liability).

III. HUNTER'S CROSS-APPEAL

[2] On cross-appeal, Hunter contends that the district court erred when it refused to permit expert testimony or to instruct the jury regarding the effect of future inflation on the award for future damages. In ruling on this matter, the district court relied on *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.), *cert. denied*, 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975), which proscribed consideration of inflation in making awards for future damages. Developments since the trial of this case indicate that *Penrod* is no longer viable law. *See Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir.1982) (en banc);[16] *see also Jones & Laughlin Steel Corp. v. Pfeifer*, ... U.S. ....., 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). Accordingly, if a new trial is necessary, the effect of future inflation on any award Hunter receives for future damages should be accounted for in an appropriate manner.

REVERSED and REMANDED.

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16. The mandate has not yet issued in *Culver v. Slater Boat Co.*, which expressly overrules *Penrod*, but *Culver* undoubtedly will govern if retrial is necessary.